

Before the  
Administrative Hearing Commission  
State of Missouri



MISSOURI STATE BOARD OF NURSING,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 11-1441 BN
	)	
ELISABETH ANN PUTMAN,	)	
	)	
Respondent.	)	

**DECISION**

Elisabeth Ann Putman’s nursing license is subject to discipline because she used and unlawfully possessed a controlled substance and because she violated drug laws of this state.

**Procedure**

The State Board of Nursing (“the Board”) filed a complaint on July 13, 2011, seeking to discipline Putman’s nursing license. We held a hearing on August 16, 2012. Ian Hauptli represented the Board, and Kevin J. Dolley represented Putman. The case became ready for decision on November 28, 2012, when the last written arguments were due.

**Evidentiary Ruling**

At the hearing, the Board offered an unauthenticated drug screen report into evidence. Putman objected that the report lacked scientific reliability. We admitted the report subject to the objection, and left the record open for thirty days pending the Board’s submission of an affidavit

to authenticate it. On September 17, 2012, the Board withdrew its request to submit the affidavit.

Putman maintains her objection that the report lacks scientific reliability and we sustain it now. The record lacks proper foundation demonstrating the report's scientific reliability. The report is, therefore, not part of the evidence herein.

### **Findings of Fact**

1. Elisabeth Ann Putman is licensed by the State Board of Nursing as a registered professional nurse (RN) in the state of Missouri. Her Missouri nursing license is current and active and was so at all relevant times.

2. Putman was looking for a nursing job between August 2010 and October 2010. She applied to Nightingale Nurses, LLC, in October 2010 and received a job offer. When she received the offer, she knew she would be subjected to a pre-employment drug screen.

3. Putman describes herself as a "blackout drinker," meaning that after becoming intoxicated, she does not remember most of what she does.

4. Putman is a recovering alcoholic. She was sober for twelve years, until October 10, 2010, when she had a severe setback related to personal issues.

5. On the evening of October 10, 2010, Putman met with an old friend and chose to drink. She remembers some, but not most of the events that took place that night. Putman consumed "a lot" of alcohol at the friend's house. She and her friend then went to a bar, where Putman had several more drinks. Then, Putman admits, "we [she and her friend] did some cocaine in the bathroom of the bar."<sup>1</sup> She took "a couple of sniffs of cocaine without thinking of the consequences, only wanting to escape from reality."<sup>2</sup>

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<sup>1</sup> Tr. 36.

<sup>2</sup> Exhibit 1, p. 3-1 (Putman's letter to the Board of Nursing).

6. Three days later, on October 13, 2010, and as the last step in her job application for Nightingale Nurses, Putman submitted urine for a drug screen. Someone from Nightingale Nurses or the company that did the drug screen contacted her and said she had tested positive for cocaine metabolites.

7. As a result of the results of the drug screen, Nightingale Nurses filed a complaint with the Board on October 27, 2010.

8. Putman voluntarily, consciously, and intentionally used cocaine on October 10, 2010.

9. Putman had no prescription for cocaine in October 2010.

### **Conclusions of Law**

We have jurisdiction. Section 621.045.<sup>3</sup> The Board bears the burden of proving that Putman committed an act for which the law allows discipline. *State Bd. of Nursing v. Berry*, 32 S.W.3d 638, 642 (Mo. App., W.D. 2000). We “separately and independently” determine whether cause exists. *Kennedy v. Mo. Real Estate Comm’n*, 762 S.W.2d 454, 456-57 (Mo. App., E.D. 1988).

The Board alleges there is cause for discipline under § 335.066.2, which provides in relevant part:

The board may cause a complaint to be filed with the administrative hearing commission as provided by chapter 621 against any holder of any certificate of registration or authority, permit or license required by sections 335.011 to 335.096 or any person who has failed to renew or has surrendered his or her certificate of registration or authority, permit or license for any one or any combination of the following causes:

(1) Use or unlawful possession of any controlled substance, as defined in Chapter 195, or alcoholic beverage to an extent that

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<sup>3</sup> Statutory references, unless otherwise noted, are to the Revised Statutes of Missouri, 2012 Supplement.

such use impairs a person's ability to perform the work of any profession licensed or regulated by sections 335.011 to 335.096;

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(14) Violation of the drug laws or rules and regulations of this state, any other state or the federal government [.]

Cause for discipline exists under § 335.066.2(1)

The Board has demonstrated cause for discipline exists under § 335.066.2(1), which covers “[u]se or unlawful possession of any controlled substance, as defined in Chapter 195[.]”

Cocaine is a controlled substance. Section 195.017.4(1)(d). By her own admission, Putman sniffed cocaine on October 10, 2010, in the bathroom of a bar. She had no prescription for cocaine. Therefore, Putman unlawfully possessed a controlled substance. *See* §§ 195.202.1 (“Except as authorized by sections 195.005 to 195.425, it is unlawful for any person to possess or have under his control a controlled substance.”); 195.060 (pharmacist may dispense upon prescription of practitioner); and 195.180<sup>4</sup> (lawful possession generally requires person to have obtained controlled substance upon valid prescription or order of practitioner, and criminal defendant bears burden of proof of any exception).

But that does not end the analysis. The parties disagree as to whether that first part of § 335.066.2(1)—“Use or unlawful possession of any controlled substance, as defined in Chapter 195,” is modified by the final part—“to an extent that such use impairs a person's ability to perform the work of any profession licensed or regulated by sections 335.011 to 335.096[.]” or whether the final part modifies only the phrase that intervenes, “or alcoholic beverage[.]” We are aware of no appellate decision specifically addressing the interplay of the first and the final parts of § 335.066.2(1), and the parties point to none.

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<sup>4</sup> RSMo 2000.

A statute should be read to effect the intent of the legislature, starting with the plain language used, *United Pharmacal Co. v. Mo. Bd. of Pharmacy*, 208 S.W.3d 907, 909-911 (Mo. banc 2006); to give effect to all words and phrases, *Koetting v. State Bd. of Nursing*, 314 S.W.3d 812, 820 (Mo. App., W.D. 2010); and to reject an interpretation that would cause a part of the statute to be ignored, *id.*

We readily acknowledge that § 335.066.2(1) can easily be read in different ways with respect to the first and final parts, and that no one way neatly resolves all construction issues. We conclude that the best reading limits the final part, concerning impairment, such that it modifies only the intervening phrase, “or alcoholic beverage,” and not the first and more removed part, “[u]se or unlawful possession of any controlled substance, as defined in Chapter 195[.]” The demonstration of use or unlawful possession of a controlled substance, without demonstration of impairment, establishes cause for discipline.

Such reading best affects the purpose of this disciplinary statute—to protect the public. *Koetting*, 314 S.W.3d at 819-820 (examining purpose of § 335.066.2); *see also United Pharmacal*, 208 S.W.3d at 911-912 (when statute is unclear, court should “consider the problem [it] was enacted to remedy”). Chapter 195 provides an extensive list of controlled substances, amended and lengthened almost annually, and criminalizes the use of them in the majority of circumstances. The public is best protected by providing for the possibility of discipline of the license of a nurse who uses a controlled substance, without additionally requiring demonstration of impairment. This is true not only because it minimizes the obvious potential for danger to patients cared for by a nurse who uses a controlled substance, but also because it promotes the high level of trust placed by health care providers and the public in a nurse. Regardless of impairment, use of a controlled substance by a nurse is unlikely to be consistent with that high level of trust.

Such reading also gives effect to all words and phrases in the statute. The first part of the statute includes “unlawful possession” as cause for discipline. But in the case in which a controlled substance is only held, unlawfully, in a licensee’s physical possession or control but not consumed, applying the requirement of impairment would likely render that phrase meaningless, a construction we should avoid. *Koetting*, 314 S.W.3d at 820.

We are aware that subsections (1) and (14) of § 335.066.2 overlap to a degree, inasmuch as the latter provides for discipline of a licensee who violates “the drug laws or rules or regulations” of this or any state, or the federal government. But we do not believe our construction of subsection (1) makes subsection (14) superfluous. Subsection (1) addresses violations of Chapter 195 as well as impairment caused by consumption of alcohol. Subsection (14) goes further, covering not only Missouri laws contained in Chapter 195, but Missouri laws that may be contained in other chapters of the Revised Statutes; Missouri rules and regulations; and the rules, regulations, and laws of any other state or the federal government.

The Board has demonstrated cause for discipline under § 335.066.2(1) on the basis of Putman’s use and unlawful possession of a controlled substance, as defined under Chapter 195.

Cause for discipline exists under § 335.066.2(14)

The Board also alleges cause for discipline exists under § 335.066.2(14), which covers a licensee who violates “the drug laws or rules or regulations” of this or any state, or the federal government. As noted above, the possession of a controlled substance generally violates Missouri law, and cocaine is a controlled substance in Missouri. Sections 195.202.1 and 195.017.4(1)(d).

Putman possessed cocaine. But, she argues, due to her intoxication she did not make a conscious or intentional decision to possess it, and she points to *State Bd. of Nursing v. Berry*, 32 S.W.3d 638 (Mo. App. W.D. 2000), for the proposition that the Board must prove such intent here. She contends the Board cannot demonstrate she had the state of mind required to establish a violation of the drug laws. The argument fails.

In *Berry*, the nurse-licensee tested positive for marijuana and cocaine – controlled substances – and the Nursing Board proved, through unanswered requests for admissions, that she had consumed them. 32 S.W.3d at 640. But, the court held, § 335.066.2(14) depends “on existing criminal statutes and is not self-sustaining.” *Id.* at 641. And proof of violation of § 195.202, a criminal statute, “requires proof of the *conscious and intentional* possession of a contraband drug.” *Id.* (citations omitted) (emphasis in original). Therefore, the court concluded, the Nursing Board was required to prove, by a preponderance of the evidence, that the nurse-licensee consciously and intentionally consumed marijuana and cocaine, which it failed to do. *Id.* at 642. Mere consumption and a positive drug test, the evidence on which the Nursing Board relied, did not prove the required state of mind. *Id.*

Here, in contrast, the record contains evidence of the licensee’s state of mind. Putman admitted in her letter to the Nursing Board that she took “a couple of sniffs of cocaine without thinking of the consequences, only wanting to escape from reality.” She admitted at the hearing herein that she “did some cocaine in the bathroom of the bar.”

Putman further argues she was not in her right mind when she took the cocaine, because of her intoxication. But the criminal law establishes a presumption, not at issue in *Berry*, that a person who is voluntarily intoxicated is criminally responsible for her conduct while so

intoxicated. Section 562.076.1.<sup>5</sup> Evidence of voluntary intoxication is not even admissible in a criminal proceeding for purposes of negating the element of a criminal offense. Section 562.076.3. Therefore, Putman's voluntary alcohol intoxication is of no moment for purposes of the § 335.066.2(14) analysis with regard to her possession of cocaine.

A preponderance of the evidence demonstrates Putman possessed a controlled substance, consciously and intentionally, in violation of the drug laws of this state.

Putman is subject to discipline under §335.066.2(14).

### **Summary**

Cause exists to discipline Putman's nursing license under § 335.066.2(1) and (14).

SO ORDERED on July 3, 2013.

\s\ Mary E. Nelson  
MARY E. NELSON  
Commissioner

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<sup>5</sup>RSMo 2000.